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No. 81-2005

In the Supreme Court of the United States

OCTOBER TERM, 1982

SUNTEX DAIRY, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Secretary of Agriculture's decision to merge six federal milk marketing order areas and some previously unregulated areas in Texas into a single marketing order area.

2. Whether the Secretary of Agriculture's decision, pursuant to Section 8c(9) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(9), to implement a consolidated milk marketing order is committed to agency discretion by law.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2098

SUNTEX DAIRY, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 666 F.2d 158. The opinion of the district court (Pet. App. A21-A28) is unreported. A previous opinion of the court of appeals remanding the case for further consideration (Pet. App. A29-A42) is reported at 591 F.2d 1063. The initial opinion of the district court (Pet. App. A43-A52) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1982. A petition for rehearing was denied on February 17, 1982. The petition for a writ of certiorari was filed on May 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are a small group of Corpus Christi milk producers who object to the Secretary of Agriculture's decision to implement a federal milk marketing order that merges six milk marketing order areas and some additional unregulated areas in Texas into one marketing order area.[1]

1. The fundamental objective of the Agricultural Marketing Agreement Act of 1937 is to maintain orderly marketing conditions for milk and other specified agricultural commodities. 7 U.S.C. 602 and 608c(2). Federal milk marketing orders establish a uniform minimum price that must be paid to milk producers by handlers who process the raw milk. 7 U.S.C. 608c(5). Producers are the principal beneficiaries of the statutory scheme. *Friendship Dairies, Inc.* v. *Butz*, 432 F. Supp. 508, 515 (E.D.N.Y.), aff'd, 573 F.2d 1290 (2d Cir. 1977).

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[1]The six previously separate milk marketing orders in Texas were: South Texas, 7 C.F.R. Part 1121 (1975); North Texas, 7 C.F.R. Part 1126 (1975); San Antonio, 7 C.F.R. Part 1127 (1975); Central West Texas, 7 C.F.R. Part 1128 (1975); Austin-Waco, 7 C.F.R. Part 1129 (1975); and Corpus Christi, 7 C.F.R. Part 1130 (1975). Petitioners receive a lower price for their milk under the merged order than under the separate Corpus Christi order (Pet. 3).

The Secretary is authorized to adopt a proposed milk marketing order if evidence adduced at a public hearing supports the order and he concludes that promulgation of the order "will tend to effectuate the declared policy" of the statute. 7 U.S.C. 608c(4). The order becomes effective if it is approved by two-thirds of the affected producers, 7 U.S.C. 608c(8)(A) and (B), and at least 50% of the affected handlers enter into a marketing agreement incorporating the terms of the order. 7 U.S.C. 608c(8). If the affected handlers refuse to enter into a marketing agreement, the order may nonetheless be implemented if the Secretary determines that (1) the lack of handler approval "tends to prevent the effectuation of the declared policy of [the Act]" and (2) the order is "the only practical means of advancing the interests of the producers." 7 U.S.C. 608c(9)(A) and (B).[2]

2. In 1973, the Secretary proposed to merge six milk marketing order areas and some previously unregulated areas in Texas into a single new milk marketing order area. 38 Fed. Reg. 31432. On the basis of evidence adduced at a nine-day hearing, the Secretary promulgated the proposed merger order after finding that the order "will tend to effectuate the declared policy of the Act." 40 Fed. Reg. 20038 (1975). More than two-thirds of the affected producers approved the issuance of the order, but the required percentage of milk handlers refused to accept a marketing agreement

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[2]The Act expressly requires a hearing to determine whether the issuance of a proposed order will tend to effectuate the purposes of the Act. 7 U.S.C. 608c(3) and (4). The statute does not, however, require an additional hearing to support the Secretary's further determinations regarding the effect of handler refusal to approve the terms of an order. See 7 U.S.C. 608c(9) (A) and (B).

incorporating the terms of the proposed order.[3] The Secretary therefore invoked the provisions of Section 8c(9) of the Act, 7 U.S.C. 608c(9), and issued a final order based on a determination that (1) the handler refusal to accept the terms of the order "tends to prevent the effectuation of the declared policy of the Act" and (2) issuance of the merger order "is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers * * *." 40 Fed. Reg. 23438 (1975).

3. Pursuant to 7 U.S.C. 608c(15)(B), petitioners sought judicial review of the Secretary's merger order in the United States District Court for the Southern District of Texas, alleging that the order was not supported by substantial evidence. Initially, the district court held that petitioners lacked standing to sue (Pet. App. A45–A49), but the court of appeals reversed and remanded (*id.* at A29–A42). On remand, the district court found that the conclusions of the Secretary were supported by substantial evidence (*id.* at A21–A28).

4. The court of appeals affirmed (Pet. App. A1–A20). The court first held that, contrary to petitioners' assertions, the Secretary's decision that the merger order tends to effectuate the policy of the Act was supported by substantial evidence and was not arbitrary, capricious, or an abuse of discretion (*id.* at A9). The court determined that the evidence fully justified the Secretary's finding that the six areas that previously had been regulated separately were "'substantially interrelated in both the distribution and procurement of milk'"

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[3] Milk handlers have never voted to approve a marketing agreement under the Act (Pet. App. A15).

(*id.* at A10) (footnote omitted). As the court noted, "[t]here was abundant evidence presented at the hearing from which the Secretary could conclude that the former six-market area was characterized by inter-market competition in distribution, common production areas, and common reserve supply" (*ibid.*).

The court further held that the Secretary's determination under Section 8c(9) of the Act to issue the merger order despite the refusal of the handlers to approve it was committed to the Secretary's discretion and was judicially reviewable only for "procedural irregularity or fraud" (Pet. App. A20). In reaching this conclusion the court relied on the Secretary's long-standing administrative construction of Subsection (9), the fact that courts are ill-equipped to second-guess the Secretary's determination of the necessity for the order under Subsection (9), and the fact that the Subsection (9) determination is not based on an evidentiary record beyond that created under 7 U.S.C. 608c(4) (Pet. App. A14–A19):

> On the basis of findings supported by substantial evidence that the order would tend to effectuate the purposes of the Act—and considering that the statutory scheme contemplates no further evidentiary hearing—we are unable to say that the judiciary could gainsay the Secretary's determination that the issuance of the order was the only practical means to effectuate the purposes of the Act when he finds that the requisite number of handlers have failed to enter into a voluntary agreement under 7 U.S.C. § 608c(8).

ARGUMENT

The court of appeals' decision is correct and does not conflict with a decision of any other court of appeals.

Accordingly, further review by this Court is unwarranted.

1. Petitioners contend that the Secretary's determination to merge the Corpus Christi marketing order with the other Texas market areas is not supported by substantial evidence (Pet. 15–18). Both courts below, however, rejected petitioners' argument that the merger order results from an improper "domino concept" (Pet. 15) and instead found that there was adequate record evidence to support the issuance of the order (Pet. App. A9–A10, A20, A24–A27). This factual issue clearly does not merit the attention of this Court. See *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

The Secretary found that a merger of the six Texas orders was justified by evidence demonstrating that (Pet. App. A59):

> [w]hen the six orders were promulgated, they regulated the handling of milk in areas that were generally distinguishable as separate markets for particular groups of producers. Changes in marketing practices since that time, however, have caused these separately regulated areas to become substantially interrelated in both the distribution and procurement of milk.

The evidence established that numerous handlers within the six separate order areas were engaged in "intermarket distribution" (*id.* at A60). The evidence also showed that (*id.* at A61):

> [a]ll of the six markets * * * [were] significantly involved in * * * overlapping supply areas. In May 1973, competition for milk supplies with at least

> one of the other regulated areas existed in 36 counties for the North Texas area, in 11 counties for the Central West Texas area, in 11 counties for the Austin-Waco area, in 15 counties for the San Antonio area, in 10 counties for the Corpus Christi area, and in 52 counties for the South Texas area.

Moreover, the evidence demonstrated that the six separate order areas resulted in an unequal division of the cost of market reserve supplies among the various milk producers in the affected areas (Pet. App. A61–A63).

The district court thoroughly reviewed the evidence underlying the Secretary's determinations and found that "the conclusion that a single order is the most appropriate method of effectuating the declared policy of the Act is reasonable in light of the record as a whole" (Pet. App. A27). The court of appeals also reviewed the record and found that "[t]here was abundant evidence presented at the hearing from which the Secretary could conclude that the former six-market area was characterized by intermarket competition in distribution, common production areas, and common reserve supply" (*id.* at A10; footnote omitted). These fact-bound determinations do not merit further review.

2. Petitioners contend (Pet. 6–15) that the Secretary's decision under Section 8c(9) of the Act to implement the merged milk marketing order despite the handlers' refusal to sign a marketing agreement is reviewable under either the substantial evidence or the arbitrary and capricious standard of review. They further contend that the Secretary's Subsection (9) determination must be made on the basis of record evidence adduced at either the original or a supplemental hearing (*ibid.*). The court of appeals correctly held that the

Subsection (9) determination need not be preceded by a supplemental hearing and that the determination itself is committed to the Secretary's discretion by law.

As the court of appeals recognized, there is no express preclusion of judicial review in the Act (Pet. App. A12). Nevertheless, "'an evaluation of the legislative scheme as well as the practical and policy implications demonstrate that review should not be allowed'" (*ibid.*, quoting *Bullard* v. *Webster*, 623 F.2d 1042, 1046 (5th Cir. 1980), cert. denied, 451 U.S. 907 (1981)). The court noted that the "committed to agency discretion" exception to judicial review is quite narrow (Pet. App. A12, citing *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971)). The court concluded, however, that "the determinations in question could not be subjected to any meaningful judicial review" because Section 8c(9) of the Act is drawn in such broad terms that there is, in effect, no law to apply (Pet. App. A13).

A milk marketing order may be issued under Section 8c(4) of the Act, 7 U.S.C. 608c(4), only if it is supported by evidence adduced at a public hearing. Moreover, the Secretary's findings under Subsection (4) are clearly subject to judicial review.[5] The decision to implement that order, however, is a discretionary decision not well-suited to judicial oversight. In the wake of han-

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[5]The court of appeals emphasized that its decision did not immunize the Secretary's actions from judicial scrutiny (Pet. App. A17):

> We do not intimate that the producers have no ability to get substantive review of the merits of the Secretary's determination. The Act's provision for review was interpreted also in our earlier decision in *Suntex Dairy* v. *Bergland*, 591 F.2d 1063 (5th Cir. 1979), to accord stand-

dlers' refusal to approve a marketing agreement, a marketing order may take effect only if the Secretary determines that (1) handler opposition "tends to prevent the effectuation of the declared policy of [the Act]" and (2) "the issuance of such order is the only practical means of advancing the interests of the producers." Section 8c(9) of the Act, 7 U.S.C. 608c(9). Wide-ranging discretion is necessarily involved in the Secretary's judgment on whether handler resistance "tends" to frustrate the purposes of the Act and whether the order is the only "practical" instrument to promote the producers' interests. The Secretary's judgment on either of these issues is simply not amenable to judicial review.

As the court of appeals stated, once a finding is made that an order will tend to effectuate the Act's purposes and policy, a finding that is reviewable and must be supported by substantial evidence, "it follows that failure by the handlers to approve such a marketing arrangement *prevents* effectuation of the policy of the Act. Judicial review of this determination could add nothing to the judicial review of the hearing provided by 7 U.S.C. § 608c(4), and such review would be duplicative and inefficient" (Pet. App. A13). As for ascertaining whether the order is the only practical means for advancing the producers' interests, the court held that issue to be equally unsuitable to judicial review, in part because the Act does not require additional evi-

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ing to producers to request a substantive review of the merits of the Secretary's decision in his [sub]section 8c(4) "tendency" determination.

dence after the Subsection (4) hearing,[6] and in part because the courts lack expertise to second-guess the Secretary's judgment (Pet. App. A19).[7]

The court's conclusion that the Subsection (9) determination is reviewable only for procedural irregularity or fraud is based on sound practical and legal considerations. Moreover, as the court acknowledged, handlers have never in the history of the Act voted to approve a marketing arrangement, and, until this case, the Subsection (9) finding "has always followed as a matter of course without further hearing or findings" (Pet. App. A15). The court properly was reluctant to intervene in this long-established administrative construction and application of the Act.

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[6] Because the Act does not contemplate the creation of an evidentiary record for the Subsection (9) determination, the court doubted that the judiciary could effectively review whether the issuance of an order was the "only practical means" to effectuate the purposes of the Act (Pet. App. A19).

[7] "With respect to determining whether there has been an error in the Secretary's judgment to issue a particular order, we consider the Byzantine nature of milk marketing regulation and we 'willingly confess our incapacity to contribute intelligently to the general course of decision' on federal milk marketing orders" (Pet. App. A18–A19, quoting *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1249 (1st Cir. 1970)).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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